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No. 85-1292

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

M.C.C. OF FLORIDA, INC.

and

MICHAEL CONSTRUCTION COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA

and

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL REGULATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF MERCHANT SHIPPING IN SUPPORT OF THE PETITION

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BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF MERCHANT SHIPPING IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae American Institute of Merchant Shipping represents 22 owners and operators of some 250 American flag vessels engaged in international commerce. The Institute and its members have a vital interest in the fair and just administration of the mari-

time law of the United States. Both of the rulings of the Court of Appeals in this case have enormous adverse implications for vessels everywhere: the ruling that the inadvertent roiling of channel bottoms constitutes a violation of the Clean Water Act and the Rivers and Harbors Act imposes severe restrictions on the scope of maritime activity, and the ruling that vessel owners sued by the Government for penalties are not entitled to a jury trial denies vessel owners an important constitutional protection. Amicus believes that these rulings are wrong, that they are of national significance, and that the Court should grant certiorari and reverse them.

ARGUMENT

I. THE RIGHT TO JURY TRIAL MUST BE PRESERVED IN ACTIONS FOR STATUTORY CIVIL PENALTIES

The denial of petitioner M.C.C.'s right to jury trial in this case sets a precedent inconsistent with both prior case law in other Circuits and this Court's many rulings on the right to jury trial. By relying on the purported equitable nature of the Clean Water and Rivers and Harbors Acts, the Court of Appeals' decision presents a direct threat to the jury trial rights of many owners and operators of maritime vessels.

This issue is of particular concern to amicus in light of the more than sixty federal civil penalty provisions potentially applicable to maritime activity. These provisions include penalties of up to $100,000 per violation for unlawful importation of protected tuna species, 16 U.S.C. § 972f (Supp. II 1984), penalties of up to $25,000 per violation for use of discriminatory rates or practices, 46 U.S.C. § 815 (1982), and penalties of up to $50,000 per shipment for violation of controls over rates and conditions of transportation. 46 U.S.C.A. § 1712 (West Supp.

1985).[1] This Court has repeatedly emphasized the importance of the right to jury trial and should reaffirm that principle in this case.

At issue here were complaints by the United States Government for injunctive relief and civil penalties for violations of the Clean Water Act and Rivers and Harbors Act, 33 U.S.C. §§ 403, 1311 & 1344 (1982), and by the intervenor Florida Department of Environmental Regulation (DER) for injunctive relief, civil penalties, and general damages under Florida law.[2] The events at issue relate to a cease and desist order served on petitioners when they began transporting barges to a federal aid bridge construction work site. Upon consideration of a welter of contradictory factual evidence, the District Court awarded $200,000 in damages and $20,000 in civil penalties for state and federal violations.

Previous courts, including this one, have concluded that such claims for civil monetary recovery present legal claims subject to the Seventh Amendment's guarantee of the right to trial by jury. First, there can be no question that a claim for monetary damages is a legal claim. *Curtis* v. *Loether*, 415 U.S. 189 (1974). Second, this Court has concluded, *Hepner* v. *United States*, 213 U.S. 103, 115 (1909); *United States* v. *Regan*, 232 U.S. 37, 47 (1914), and the Second Circuit has held, *United*

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[1] In the Appendix to the petition for certiorari filed with this Court in the case of *United States* v. *Tull*, 769 F.2d 182 (4th Cir. 1985) (No. 85-1259), the Court will find a listing of the vast array of penalty provisions in which factual determinations are initially made in a court proceeding, rather than by an administrative tribunal. *See Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) (Congress may assign the fact-finding function and initial adjudication to an administrative forum without violating the Seventh Amendment).

[2] Florida law imposes liability to the State for any damage caused by violation of certain environmental provisions. Fla. Stat. Ann. § 403.141 (West Supp. 1985).

States v. *J. B. Williams Co.*, 498 F.2d 414, 422-23 (2d Cir. 1974), that actions for statutory civil penalties are covered by the Seventh Amendment guarantee.

The Eleventh Circuit's rejection of the reasoning of this Court and the holding of the Second Circuit represents an unwarranted departure from settled doctrine.[3] In particular, the Court of Appeals' misguided Seventh Amendment analysis, if left undisturbed, poses a severe threat to the right to jury trial under the penalty provisions of the Rivers and Harbors Act and the Clean Water Act. The court correctly noted that when a case presents both legal and equitable issues, "the right to jury trial as to the legal issues remains." *United States* v. *M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985). *See Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). It then disregarded that rule and based its decision on two cases applying the Rivers and Harbors Act and Clean Water Act which had relied upon equitable principles. 772 F.2d at 1507. It concluded that, since equitable principles had been applied to these Acts, the issues in the case before it "were equitable in nature." *Id.*

Neither of the cases upon which the Court of Appeals relied supports a finding that the present action for civil penalties and damages is "equitable." In *Wyandotte Co.* v. *United States*, 389 U.S. 191 (1967), the Court implied a remedy not expressly available under the Rivers and Harbors Act. The application of equitable doctrines to devise such an additional remedy has no bearing on whether monetary remedies expressly stated in the statute are legal or equitable. In *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the issue was the scope of a court's equitable discretion under the Clean Water Act.

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[3] The Fourth Circuit has followed the same path as the Eleventh in *United States* v. *Tull*, *supra*, review of which is also being sought in this Court (No. 85-1259).

The Court of Appeals had held that the Act imposed an absolute statutory obligation to enjoin illegal discharges; this Court reversed that decision and held that the federal courts could exercise their equitable discretion to determine the best course by which to achieve compliance with the Act. 456 U.S. at 318-319. Neither case involved an action for civil penalties, and neither addressed the issues presented in this case.

The Eleventh Circuit's broad-brush approach sweeps far beyond the facts of this case to threaten the right to jury trial in any action which arises under the Rivers and Harbors Act, the Clean Water Act, or any other federal statute to which equitable principles have ever been applied and in which factual determinations are initially made in a court proceeding, rather than by an administrative tribunal.[4] The Court's decision on the jury trial issue merits summary reversal by this Court.

II. THE NORMAL USE OF A WATERWAY FOR NAVIGATION DOES NOT OBSTRUCT THE WATERWAY OR CONSTITUTE A DISCHARGE OF POLLUTANTS

The second ruling by the Court of Appeals has implications even more wide-reaching for the maritime industry. The court held that the normal operation of a tugboat, which by its use of propellers necessarily stirs up the water in which it operates, can constitute unlawful dredging and discharging of pollutants into a waterway. 772 F.2d at 1504-06. Such a major change in the law has serious implications for all vessels which at any time operate in shallow water, and it cannot be reconciled with the intended purpose and scope of the Rivers and Harbors Act or the Clean Water Act.

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[4] *See Atlas Roofing Co., supra* note 1.

A. The Court of Appeals' Decision Offers a Dramatically New Interpretation of the Rivers and Harbors Act

The Court of Appeals' unprecedented holding that the normal operation of a tugboat can violate Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, will have wide-ranging results directly contrary to that Act's primary purpose: the promotion of navigation. Under the court's decision, the threat of substantial federal penalties will force large numbers of vessel operators to engage in the expensive and time-consuming process of seeking a dredging permit before they may leave the dock. Congress never intended such a result in the Rivers and Harbors Act.

The goal of the Act was to ensure that navigable waters would remain unobstructed and free for navigation. *E.g.*, *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 707-709 (1899); *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1297 (5th Cir. 1976); *Potomac River Ass'n, Inc.* v. *Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 351-358 (D. Md. 1975). In connection with that goal, the Act rendered it unlawful to "excavate or fill, or *in any manner to alter or modify* the course, location, condition, or capacity of, any * * * channel of any navigable water" unless the "work" is approved by the Secretary of the Army. 33 U.S.C. § 403 (emphasis added). *See* 33 C.F.R. § 322.3(a) (1984) (permit requirement).

By its terms, this statute bars the slightest alteration of any aspect of a navigable waterway; it cannot reasonably be taken at face value. Instead, the scope of its prohibition must be interpreted with the Act's goals in mind. The provision refers to "navigable water," and the definition of navigability presumes the existence of vessels plying the waters. *See* 33 C.F.R. § 329.4 (1984) (navigable waters are those useful "to transport interstate or foreign commerce"). The disturbance of the

water necessarily associated with such maritime traffic could not have been within the intended scope of the statutory words "excavate" or "alter or modify." [5]

The decision of the Court of Appeals does not merely ignore the Act's goals; it directly defeats them. Instead of interpreting Section 403 in a manner that fulfills the Act's purpose of promoting and protecting navigation, the court has chosen to impose severe burdens on maritime traffic. Its decision in this case requires every person who wishes to operate a vessel in shallow or tidal waters to seek a permit—which may or may not be granted—or operate in violation of the law and incur substantial penalties.

This Court should make clear that the Rivers and Harbors Act cannot be interpreted in such a way as to defeat its very reason for being. The Court should reverse the Court of Appeals' holding that the normal operation of a vessel in navigable waters can constitute unpermitted excavation or alteration of a navigable channel under the Act.

B. The Court of Appeals' Decision Distorts the Meaning of the Clean Water Act

This case is about a tugboat which disturbed the grass and sandy bottom of a waterway. The Court of Appeals' decision turns it into a case of a "point source" which "discharged pollutants" into the water. *See* 772 F.2d at 1505-06. By such a definition, wading in a creek without a permit becomes a violation of the Clean Water Act. Such a strained interpretation cannot be allowed to stand.

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[5] The Corps of Engineers has adopted regulations governing "dredging," and has indicated that its regulations are based in part on Section 403. *See* 33 C.F.R. § 322.2(c) (1984) (defining the term "work" in Section 403 to include "dredging" or "other modification" of a "navigable water"). The term "dredged material" is defined to mean material "excavated or dredged." 33 C.F.R. § 323.2(i) (1984).

The court noted that the sea grass, sand and mud distributed by M.C.C.'s craft was moved through the water and "redeposited" on adjacent sea grass. 772 F.2d at 1506. This slight movement of material already in the water was deemed sufficient to render it "dredged spoil" that was "discharged" by M.C.C.[6]

The Act defines the "discharge" of a pollutant as the "*addition* of any pollutant to navigable waters from any point source * * *." 33 U.S.C. § 1362(12) (1982) (emphasis added). The Court of Appeals interpreted the plain language of this provision—the word "addition"—to include "redeposit." 772 F.2d at 1506. It relied upon two authorities: the expressed concern in the legislative history of the Clean Water Act for the "biological integrity of the Nation's waters," 772 F.2d at 1506 (quoting 33 U.S.C. § 1251 (1982)), and the case of *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983). 772 F.2d at 1506.

The Clean Water Act was not designed to prohibit all uses of the waters; it was intended—as the court's own selection from the legislative history demonstrates—to prevent man-made changes that "overtax[] the ability of nature to restore conditions to 'natural' or 'original' * * *." 772 F.2d at 1506 (quoting H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 76-77 (1972)). Although the court found some damage to the stream bottom, 772 F.2d at 1503-04, amicus submits that the effect of normal boat traffic on a waterway designated as navigable does not, as a matter of law, rise to the level of "overtaxing" nature beyond its capacity to recover.

Similarly, the case upon which the court relied presented a situation entirely different from this one. In

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[6] *See* 33 U.S.C. §§ 1311 (outlawing the "discharge of any pollutant"); 1362(6) (defining "pollutant" to include "dredged spoil," "biological materials" and "rock sand") & 1362(14) (defining "point source" to include a "vessel") (1982).

Avoyelles, the defendants bulldozed, burned and levelled 20,000 acres of wetland in order to transform it into a field suitable for growing soybeans. The Fifth Circuit concluded that the defendants' activities "would significantly alter the character of the wetlands and limit the vital ecological functions served by the tract." *Avoyelles*, 715 F.2d at 923. It therefore concluded that, in order to serve the purposes of the Act, the defendants' "redepositing" of materials taken from the wetlands constituted a discharge. *Id.* at 923-924.

In the present case, there was no activity that changed the use of the stream or that was shown irreversibly to affect its integrity. M.C.C.'s vessel was simply using a navigable stream for the purpose of navigation. It distorts the Clean Water Act to extend its prohibitions to such activity.[7]

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[7] The inconsistency of this decision with the Act's permit structure provides further evidence that no permit requirement was contemplated. Under the permit procedures of 33 U.S.C. § 1344 (1982), a vessel operator may be issued a permit to discharge dredged material only after "notice and opportunity for public hearings" addressing the applicant's "specified disposal sites." 33 U.S.C. § 1344(a) (1982). Under certain circumstances, an applicant may seek a general permit without the need to specify a site, but notice and hearing procedures must still be followed. *Id.* § 1344(e). *See also* 40 C.F.R. Part 230 (1985) (detailed guidelines for permit applications). Since the precise site, timing, and nature of a vessel's purported "dredging" are to a large extent unforeseeable to the applicant, it is difficult to envision how the standard permit application procedures could be followed.

CONCLUSION

The Court of Appeals' decision in this case disregards established principles governing the right to jury trial and distorts the meaning of the Rivers and Harbors Act and Clean Water Act. By virtue of this decision the simple operation of a tugboat in navigable waters becomes a violation of numerous federal laws and regulations, imposing the need for extensive permit applications. In light of the severe burden imposed on the maritime industry by this decision, it is imperative that this Court grant certiorari and reverse the Eleventh Circuit's decision.

Respectfully submitted,

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